Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND THE ARIZONA CORPORATION COMMISSION,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 30, 2004

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 is exercise in cooperative federalism designed to "fundamentally restructure[] local telephone markets." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Key provisions, 47 U.S.C. §§ 251 & 252, create a critical State role in the process of allowing competing local exchange carriers ("LECs") to gain entry via interconnection, resale, or access to incumbent LECs networks. Congress specified that (1) *States may implement pro-competition measures consistent with the Act.* 47 U.S.C. § 251(d)(3) & § 261 and (2) preemption is not to be implied, 47 U.S.C. §152 (§ 601, *codified in* notes) At its core, this case is about the role Congress expected States to play in the scheme established in 1996. Questions include:

1. Whether, in administering a statute that is an exercise in cooperative federalism, a federal agency is barred from asking States to make additional determinations in accord with substantial guidance provided by the agency where that Act (§ 251(d)(3)) expressly reserves to States authority to make independent unbundling determinations?

2. Alternatively, assuming the Court was correct it its "subdelegation" analysis, whether *vacatur* was proper given that *Congress* has expressly and directly delegated to States the authority to make unbundling decisions?

3. Whether, the FCC's reversal of previous findings requiring line sharing, upheld on review, is adequately explained and supported by substantial record evidence?

4. Whether the FCC proposal to examine if a delisted element's rate satisfies the just and reasonable pricing standard of §§ 201 & 202 through a § 271(d)(6) enforcement proceeding is consistent with the § 252 scheme requiring State arbitrations of disputed terms associated with an interconnection agreement and the limitation on § 201 to cover only "interstate or foreign communication."

PARTIES TO THE PROCEEDING* AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows: The ***National Association of Regulatory Utility Commissioners (NARUC)*** is a quasi-governmental corporation organized under the laws of the District of Columbia with its principle place of business in Washington, D.C. Created in 1889, NARUC's members include the State public service commissions in the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands charged with overseeing the activities of, *inter alia*, communications common carriers. NARUC has no parent corporation. No publicly traded company owns any equity interest in NARUC. NARUC adopts policy stances through resolutions passed by its members. NARUC's day-to-day operations are governed by its Officers, Executive Committee, Board of Directors, and Standing Committees. Only commissioners from the agencies that constitute its membership are allowed to serve as officers or as voting members of those bodies. Co-petitioner ***Arizona Corporation Commission*** is a State governmental entity so no Rule 29.6 statement is necessary.

Along with Petitioners, the following were also parties to the District of Columbia Circuit proceedings below: (1) AT&T Corp. (2) AT&T Wireless Services, Inc. (3) Allegiance Telecom, Inc. (4) Association of Communications Enterprises (5) Association for Local Telecommunications Services (6) Allegiance Telecom, Inc. (7) BellSouth Corp. (8) Birch Telecom, Inc. (9) BridgeCom International, Inc. (10) CIMCO Communications, Inc. (11) Catena Networks, Inc. (12) Cbeyond Communications, LLC (13) CO Space Services, LLC (14) Competitive Telecommunications Association/ASCENT (15) Alliance (16) Conversent

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* In addition to the certificate of service filed concomitantly with this petition, Petitioners also e-mailed copies of this brief to at least one representative of the parties listed on the certificate of service.

Communications, LLC (17) Covad Communications Company (18) Data Net Systems, LLC (19) EarthLink, Inc. (20) Eschelon Telecom, Inc. (21) El Paso Networks, LLC f/k/a El Paso Global Networks (22) Federal Communications Commission (23) Focal Communications Corp. (24) General Communication, Inc. (25) ICG Communications, Inc. (26) InfoHighway Communications (27) Information Technology Association of America (28) KMC Telecom III, LLC f/k/a KMC Telecom, Inc. (29) LDMI Telecommunications, Inc. (30) Manhattan Telecommunications Corp. d/b/a Metropolitan Telecommunications (31) McLeodUSA Telecommunications Services, Inc. (32) Mpower Communications Corp. (33) National Association of State Utility Consumer Advocates (34) National Telecommunications Cooperative Association (35) Network Access Solutions Corp. (36) Network Access Solutions, Inc. (37) New York Public Service Commission (39) NewSouth Communications Corp. (40) Nextel Communications, Inc. (41) NuVox, Inc. (42) Pennsylvania Public Utility Commission (43) Public Utilities Commission of the State of California (44) People of the State of New York and Public Service (45) Commission of the State of New York (46) Promoting Active Competition Everywhere Coalition (47) Qwest Communications International Inc. (48) Qwest Corp. (49) RCN Telecom Services, Inc. (50) Rhythms NetConnections, Inc. (51) Sage Telecom, Inc. (52) SBC Communications Inc. (53) SNiP LiNK, LLC (54) Sprint Corp. (55) T-Mobile USA, Inc. (56) TDS Metrocom, LLC (57) Talk America Inc. (58) Telecommunications Resellers Association (59) United States of America (60) United States Telecom Association (61) VeriSign Communications Services f/k/a Illuminet (62) Verizon Telephone Companies (63) WorldCom, Inc.(MCI) (64) XO Communications, Inc. (65) Xspedius Communications, LLC (67) Z-Tel Communications, Inc.

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APPENDIX B

In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16798 (2003), corrected by *Errata*, 18 F.C.C.R. 19020 (2003).

APPENDIX C

Federal statutory materials.

** As also pointed out in footnote 1, *infra*, Counsel of Record, concerned that estimated cost of reproducing the 1000 page+ required appendix could effectively prevent the States from filing a petition, contacted Mr. Chris Vasel of the Supreme Court's Clerk's office (202-479-3027). Mr. Vasel confirmed in two separate phone calls, that NARUC and its co-petitioners could cite to the appendix being filed June 30, 2004 by AT&T *et. al.* seeking review of the same D.C. Circuit decision. NARUC contacted counsel for AT&T and arranged to receive an early copy of their appendix. Accordingly, all appendix cites in this document are to the appendix filed by AT&T *et.al.*

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The opinion of the court of appeals (App.A-1a *et seq.*)[1] is reported at 359 F.3d 554. The Federal Communications Commission's order (App.B-66a *et seq.*) is reported at 18 FCC Rcd. 16,978, and an *Errata* correcting the order is reported at 18 FCC Rcd. 19,020.

JURISDICTION

The court of appeals entered judgment March 2, 2004. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Statutory provisions are from the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, and are reproduced at App. C-1036a *et seq.*

INTRODUCTION

This Court should grant certiorari and reverse the decision below, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-69 (D.C. Cir. 2004) ("*USTA II*"), because that decision conflicts with decisions of this Court and other courts of appeals, because it effectively disables critical provisions of an "unusually important legislative enactment," *Reno v. ACLU*, 521 U.S. 844, 857 (1997), the Telecommunications Act of 1996, and because that decision also threatens other federal programs that depend upon schemes of "cooperative federalism."

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[1] Concerned that the cost of reproducing the 1000 pages+ appendices would not allow the States to file a petition, Counsel contacted Mr. Chris Vasel of the Supreme Court's Clerk's office, who confirmed in two separate phone calls, that NARUC could cite to the appendices also being filed today by AT&T *et al.* seeking review of the same D.C. Circuit decision. NARUC contacted counsel for AT&T and arranged to receive an early copy of their appendix. Accordingly, all appendix cites in this document are to the appendix filed by AT&T *et al.*

In the decision below, the D.C. Circuit vacates portions of the FCC's *Triennial Review Order* ("*TRO*")[2] requiring incumbent local exchange carriers ("ILECs") to share components of their local networks with competitors, and establishing extensive federal standards to guide State commissions in determinations of which unbundled network components do *not* have to be shared. It finds that States can play no role in these determinations, and that the FCC's findings are inadequate standing alone. It simultaneously upholds broad FCC determinations *limiting* other sharing ("unbundling") rights of competitors, *e.g.*, so-called "line-sharing;" determinations that cannot, and do not, reflect conditions in specific markets. This D.C. Circuit decision jeopardizes competition in the local exchange market that has developed over the last decade, which is dependent on those rights. It also upholds FCC determinations with respect to pricing that simply ignore clear Congressional assignment of certain tasks to the States. For more than a decade, State commissions across the country have expended extraordinary resources to introduce, maintain and encourage competitive markets. Although States have done much of the heavy lifting to bring competition to local markets, the Court's decision effectively limits States' ability to play a further substantive role. The FCC is not well positioned to succeed without the States' assistance, given the heavy burden the Court imposed as a prerequisite to authorizing unbundling. The result is an order that effectively disables many of the Act's critical leasing provisions. It also flies in the face of the cooperative scheme established by the Act and the express authority given to States to make unbundling determinations.

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[2] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16798 (2003), corrected by *Errata*, 18 F.C.C.R. 19020 (2003) ("*TRO*").

The court reached this result by starting from the premise that the Act creates a strong presumption *against* unbundling, a premise contrary to the basic structure of the Act, as well as to this Court's conclusions in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*IUB*") and *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) ("*Verizon*"), and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 124 S. Ct. 872 (2004) ("*Trinko*").

The D.C. Circuit's *vacatur* of the FCC's decision granting unbundling rights also was based on the FCC's simultaneous decision to "delegate" to State commissions the task of identifying any particular markets where those rights would not apply. The D.C. Circuit held such delegation was impermissible absent express authorization from Congress. In the court's view, even given the cooperative federalism approach of the statute,[3] and the clear reservations of State authority to impose unbundling,[4] federal agencies "may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so." *USTA II*, 359

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[3] Congress intended the States and the FCC "craft a working relationship. . .built on mutual commitment to local service competition . . .in which the FCC establishes uniform, national rules for some issues, the States and the FCC administer these rules, and the States adopt other critically important rules to promote competition." *In re Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 53 (1996) ("*Local Competition Order*,"); *see also* former FCC Rule 317 (1996), 47 C.F.R. §51.319 (1996).

[4] *Compare, e.g.*, 47 U.S.C. § 261 (preserving existing and additional State regulations "to further competition.") App.C-1057a; 47 U.S.C. § 252(e)(3) (preserving "requirements of State law in [the State commission's] review of an agreement") App.C-1052a; 47 U.S.C. § 253(b) (preserving "the ability of a State to impose . . . requirements necessary to preserve and advance universal service . . . and safeguard the rights of consumers") App.C-1055a; 47 U.S.C. § 254(i) (directing States to ensure that "universal service is available at rates that are just, reasonable, and affordable"); 47 U.S.C. § 153(41) (recognizing State "regulatory jurisdiction with respect to intrastate operations of carriers").

F.3d at 566. That ruling squarely conflicts with both *Wisconsin Dep't of Health and Family Servs. v. Blumer*, 534 U.S. 473, 495-96 (2002), and *Batterton v. Francis*, 432 U.S. 416 (1977), as well as decisions from other courts of appeals. This Court should grant certiorari to resolve these conflicts.

The court's decision never comprehensively addresses critical flaws in the FCC's order - ignoring the disparity between the statutory requirement for arbitrations of disputed "interconnection" terms and the FCC's proposal to enforce different pricing standards via a § 271 enforcement proceeding. The decision also devotes little space to the clear frailties of the FCC's analysis of the line-sharing issue.

STATEMENT OF THE CASE

For over a century, regulation of local communications service has been a State matter, while interstate communications was the province of the Federal Communications Commission ("FCC"). *See, e.g., Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-49 (1930). Until recently, local service was provided by monopoly providers granted exclusive franchises by State regulators, while those same providers' interstate long-distance operations were supervised by the FCC. In 1982 the Justice Department and AT&T entered a consent decree divesting AT&T of its local regional Bell Operating Companies ("BOCs"). *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983). As a result of that structural separation, along with FCC rules requiring AT&T to provide competitors access to its long-distance facilities, long-distance telephone markets became competitive. *See NARUC v. FCC*, 737 F.2d 1095, 1101-11 (D.C. Cir. 1984). In the 1990s a similar transformation began in local telecommunications markets. State legislatures and regulatory agencies began to encourage competition in their local markets. The States copied the model that had been successful in the long-distance market,

requiring the local telephone monopolists to share their network facilities with would-be competitors at regulated rates. By 1996, fifteen States, representing 48% of the nation's phone lines, were "in the advanced stages of the process towards local competition," with another eleven States being at the "middle stages of the regulatory process" toward local competition. *See* Stephanie Comfort, *et al.*, *Telecommunications Services: National Survey of Local Competition Issues: A State-by-State View* (1996).

In the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, Congress made this move towards local telephone competition national policy, and sought to introduce a role for the FCC while maintaining the momentum and expertise that lay with the States. The 1996 Act thus is "an exercise in what has been termed cooperative federalism." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 8 (1st Cir. 1999). It required the FCC to work hand-in-hand with State agencies bodies to open local markets to competition. *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 876, 882 (2004) (discussing specific examples of the FCC and State commissions working cooperatively to implement the pro-competitive goals of the 1996 Act); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1694 (2001) (describing the 1996 Act as "perhaps the most ambitious cooperative federalism regulatory program to date"). A key section of the Act is 47 U.S.C. § 251(c)(3) requiring the "unbundling," or sharing, of the incumbent's network facilities, or "elements." App.C-1039a. That provision adopts as a federal matter the rules already in place in many States to bring competition to local markets by requiring sharing of network infrastructure. It also requires both the FCC and State regulators to implement the Act's unbundling regime.

The provisions of § 251(d) (App.C-1041a) govern the implementation of the Act, including the requirements specified in § 251(c). (App.C-1038a) With exceptions not relevant here,[5] Congress did not require the FCC to issue regulations implementing any specific subsection of § 251's market-opening provisions. It did, however, require the FCC generally to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within six months. 47 U.S.C. § 251(d)(1); App.C-1041a. By requiring the FCC to "complete all actions *necessary* to establish regulations," rather than requiring the FCC to "complete *all* regulations," Congress evidently contemplated a regime in which the FCC might not itself always establish the regulations, but might instead share regulatory responsibilities. Congress also required that in those circumstances where the FCC did set "access standards" to "determine[] what network elements should be made available" under the Act's leasing provision, it "shall consider, at a minimum, whether" competitors would be "impaired" without access to the incumbents' non-proprietary facilities. § 251(d)(2); App.C-1041a.

In addition to the implications inherent in the language of § 251 generally, Congress also expressly preserves State local competition law, mandating that the FCC "*shall not preclude* the enforcement of any regulation, order, or policy of a State commission" that establishes unbundling obligations of local carriers, is consistent with the requirements of § 251, and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3) (Emphasis Added). (App.C-1041a)

Moreover, under the Act it is the States, not the FCC, that have final word on the terms that govern inter-carrier relationships. The terms of the ILECs' leasing arrangements

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[5] *See,* 47 U.S.C. § 251(e) (numbering authority)(App.C-1042a).

with its competitors are set through voluntary negotiations. § 252(a)(1); App.C-1046a. *If those negotiations fail, Congress designated State commissions, not the FCC, to set the actual interconnection agreement terms that govern the leasing required by federal and State law.* § 252(b); App.C-1047a. In setting those terms, State commissions are to follow FCC regulations to the extent they govern resolution of a disputed matter. *See* 47 U.S.C. §§ 252(c)(1); (App.C-1049a); 252(e)(2)(B); (App.C-1051a); *IUB*, 525 U.S. at 385 n.10. But to the extent the disputed matter is not subject to any FCC rule, the States are to apply the unbundling and other requirements of the Act itself, as well as their own law so long as it is consistent with the larger purposes of the Act. Congress thus left it to the State commissions, "guided by the provisions of the Act and by the concomitant FCC regulations," to "exercise their expertise about the needs of the local market and local consumers." *Puerto Rico Tel. Co.*, 189 F.3d at 14. *See, e.g.*, 47 U.S.C. §§ 252(e)(3); (App.C-1052a); 253(b) (App.C-1055a);, 261(b)-(c) (App.C-1057a); § 152 note (Pub. L. No. 104-104, § 601(c)).

Three times, the FCC has issued regulations implementing the statutory unbundling requirements. Each effort has been reversed by the courts. In its first two regulations, the FCC was reversed for failing to give sufficient substantive content to the statute's "impairment" requirement. *IUB*, 525 U.S. 366, 388 (1999); *USTA v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002). *But in both of these sets of regulations, the FCC's process for implementing its unbundling standard delegated to the States a prominent role in unbundling network elements, and this feature has been (until now) consistently upheld by the courts.*

It has been a consistent feature of the regulatory framework *since 1996* that the FCC defined "impairment," unbundled certain facilities on a nationwide basis pursuant to that standard, *and then left to the State commissions the responsibility of applying the FCC's impairment definition to*

unbundle additional elements as State-specific conditions required. See 47 C.F.R. §§ 51.317 (1996), 51.319 (1996), 51.317 (1999), 51.319 (1999). Until the decision below, the FCC's authority to delegate the unbundling decision to the States has never been disputed.[6]

The third set of unbundling regulations that are at issue here were the result of the FCC efforts to comply with the court of appeals' mandate in *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 421-28 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003). There the D.C. Circuit rejected the FCC's unbundling rules principally because, in the court's view, they were not sufficiently "granular." According to the court, the FCC's nationwide rules were not

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[6] Indeed, the only challenges to the role afforded to the States in these first two regulatory programs was that the States were not given a prominent *enough* role. Incumbent carriers vigorously advocated that the FCC should not identify *any* specific unbundled elements, but should leave it to the States to apply the FCC general standards to specific elements. One incumbent, argued in the FCC's second rulemaking proceeding that, "[i]n a whole range of contexts, State arbitrators must apply national standards, and there is no reason why they are incapable of doing so here." Comments of Ameritech, CC Docket No. 96-98, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, at 64-65 (May 26, 1999); *see also id.* at 67 (arguing that the FCC should adopt general unbundling standards, which "could be applied by State commissions on a market specific basis"). *See also* Comments of Qwest Communications Corp., CC Docket No. 96-98, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, at 40 (May 26, 1999) ("the State commissions can and should have an important role in developing the factual record needed to determine whether a wholesale market has developed in a particular geographic area"); Comments of US West, Inc., CC Docket No. 96-98, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, at 30 (May 26, 1999) ("State-level determinations would bring needed flexibility to the Commission's unbundling regime because both new entrants and incumbents would be allowed to rebut a Commission presumption with evidence that the presumption is not accurate for an individual market or area").

carefully enough calibrated to assure that unbundling would occur only in the specific locations in which there was an administrative record supporting a finding of impairment. *USTA I*, 290 F.3d at 422-26. The court also criticized the FCC for not adopting a rigorous definition of impairment. *Id.* at 426-28. Finally, the court vacated the FCC's decision granting competitors access to "line sharing," the process by which competitors lease only the high frequency portion of the loop used to provide broadband service (such as high speed internet access). The court said that the FCC had failed to adequately consider the availability of intermodal alternatives. *Id.* at 428-30.

In response, the FCC adopted a rigorous definition in which it would find impairment only where CLEC competition would be uneconomic in the absence of unbundling. It then applied that definition to the particular markets identified in the record – the enterprise market (large business customers) and the mass market (residential and small business customers) – and also considered whether there were policy reasons not to unbundle even where CLECs were impaired. Based on these considerations, the FCC eliminated unbundling of many elements. Among these were the broadband capabilities of the analog loops used to serve mass market customers when these are made up partly or entirely of fiber, as is increasingly the case.

In addition to eliminating competitors' access to the broadband capabilities of loops partly made of fiber, the FCC substantially reduced the ability of competitors to provide broadband service over the copper loops that are still used by the majority of residential customers. In other words, the FCC reversed its longstanding decision allowing competitors to engage in "line sharing." *TRO* ¶¶ 255-63; App.B-326a. The FCC concluded that if CLECs wanted to provide broadband service, they needed to lease the entire copper loop, including the capabilities of the loop used to provide voice service, even though this would force them to

enter two markets (voice and data) simultaneously. Two commissioners dissented. Chairman Powell explained that "line sharing has clear and measurable benefits for consumers," and "pressure[s] incumbents to deploy more advanced networks." Powell Statement at 1-2; App.B 957a. *See also Verizon*, 535 U.S. at 516-17. Commissioner Abernathy explained that the majority had "not advanced a clear rationale that overcomes the record evidence that line sharing promotes competition *and* investment." Abernathy Statement at 7; App.B 998a. A third commissioner on the five member Commission explained that he too would have preferred to maintain line sharing. Copps Statement.

In addition to limiting competitors' access to broadband capabilities, the FCC dramatically reduced access to other unbundled elements. It eliminated competitors' access to switching when used to serve enterprise customers, and also eliminated access transport at high capacity levels. But the FCC maintained access to other elements, making national findings of impairment concerning switching used to serve mass market (residential and small business customers) and transport (at lower capacity levels).

With respect to switching, the FCC reached the same conclusion reached by many States that have examined the evidence – while competitors have deployed their own switches to serve large business customers, they have generally not used those switches to serve mass market customers because of significant barriers to doing so.[7] The FCC found that while competitors had deployed 1300 switches to serve enterprise customers and had every incentive to fill up those switches by serving mass market

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[7] *See, e.g.*, Report of the Michigan Public Service Commission, Case No. U-12320, January 13, 2003, at 3, available on-line at: http://www.cis.state.mi.us/mpsc/orders/comm/2003/u12320m271report.pdf (explaining that the local residential competition that made it reasonable to permit SBC to provide long distance service stemmed almost entirely from competitors that leased unbundled switching).

customers, *TRO*¶ 447 n. 1365; App.B-532a, competitors served at most 3 million residential lines on their own switches – less than 3 percent of the market, and most of these lines were provided by cable companies that are in a unique position because they do not have to lease loops from incumbents. *TRO* ¶¶ 438-440; App.B-525a The FCC found that a key reason for this is that the hot cut process by which the incumbent manually breaks a hardwired connection between its loop and switch and reconnects the loop to the competitor's facilities, "lead[s] to provisioning delays and service outages," *id.* ¶¶ 465-66; App.B-554a, and is presently unworkable at the volumes that would be needed to serve the mass market, *id.* ¶¶ 459, 465, 468-69; App.B-549a, 554a, 558a, citing to State findings. *Id.* ¶ 469; App.B-561a. The FCC pointed out that even at present hot cut volumes, CLECs, such as AT&T, that have attempted to use this process have been forced to withdraw from the market. *TRO* ¶¶ 465, 468; App.B-554a, 558a. Moreover, the FCC found that in addition to hot cuts, substantial cost disadvantages faced by competitors could render competition uneconomic in particular markets, though the FCC did not rest its national finding on this fact. *TRO* ¶¶ 476-485; App.B 573a.

As with mass market switching, the FCC made a national finding of impairment with respect to transport facilities below a certain capacity level. A unanimous FCC generalized from empirical evidence of where deployment had occurred and economic evidence of where revenues could justify the fixed and "sunk" investments in alternative transmission facilities to find that competitors did not need access to incumbent facilities above these thresholds but did need access below the thresholds. *TRO* ¶¶ 371, 376, 386-88; 390-92, 401 & n.1245, 410; App.B 453a, 459a, 470a-473a, 477a-479a, 487a, 496a.

While the FCC found that competition using CLECs' own mass market switching and lower capacity transport facilities was not possible "in the large majority of

locations," *TRO* ¶¶ 473, 387; App.B-570a, 471a, and thus that it "could [have] end[ed]" its decision with its finding of national impairment, *TRO* ¶ 422; App.B-507a the FCC nonetheless found such competition might be possible in "particular instances," *TRO* ¶ 473; App.B-570a.

The FCC determined, however, that the extensive record it had compiled did not enable it to identify these exceptional cases. *TRO* ¶¶ 392, 473; App.B-479a, 570a. It therefore requested that State commissions determine if there were exceptional locations within their States in which those national impairment findings did not apply because of unique geographic or market circumstances. *See, e.g. TRO* ¶¶ 394-418, 486-527; App.B-481a, 580a.

To make these State determinations as "straightforward and predictable" as possible, *TRO* ¶ 196; App.B-272a, the FCC devoted over 70 paragraphs of the *TRO* to detailed instructions to guide the State proceedings. *TRO* ¶¶ 328-340, 394-418, 486-533; App.B-399a, 481a, 589a. In particular, States were to examine whether there were three retail competitors or two wholesale competitors in a particular market self-providing switching or transport facilities, and whether, if not, there was nonetheless evidence showing that self-provisioning would be economic in that market and any operational barriers could be overcome. *See id.* ¶¶ 329, 400, 462-63; App.B-400a, 487a, 552a. The FCC's rules required States to conclude proceedings that make these granular market-by-market findings within nine months. *See id.* ¶ 190; App.B-267a. All five FCC commissioners joined in the decision to involve the States in making these determinations to ensure that the characteristics of specific market did not undermine the agency's national "impairment" findings. *See id.* ¶ 425 n.1300; App.B-509a.

In the decision below, the D.C. Circuit once again vacated the FCC's unbundling regime. *USTA II*, 359 F.3d at 594. This time, the court was not content merely to take aim

at the FCC's impairment standard. Instead, and remarkably, it concluded that the FCC's "subdelegation" of unbundling authority to the States was unlawful. It reasoned that, even in the context of longstanding regulations implementing a scheme of cooperative federalism, "federal agency officials . . . may not subdelegate to outside entities — private or sovereign — absent affirmative evidence of authority to do so." *Id.* at 566; App.A-12a. It then found that without the rule requiring the States to engage in more "granular" unbundling analysis, the FCC's conclusion that competitors were generally impaired without access to ILEC switches, transport and high-capacity loop facilities was insufficiently granular, and thus violated the mandate of *USTA I*, even though the FCC had found there was no evidence in the record to enable it to make more granular determinations. It directed the FCC to adopt new unbundling rules in which it, alone, would make the granular, market-by-market, impairment analysis that the D.C. Circuit had required in *USTA I*. *Id.* at 568-75.

At the same time, in a related ruling the court once again rejected the FCC's "impairment" standard. It found that this time the FCC had failed to take into account any implicit subsidies contained in State retail telephone rates despite the FCC's extensive discussion of this issue at *TRO* ¶¶ 154-169; App.B-232a. In the court's view, the existence of such subsidies could undermine the rationality of unbundling in subsidizing and subsidized rate zones, and could expose the incumbents to an unfair competitive disadvantage. On remand the FCC was therefore instructed to assess in every rate zone the extent to which retail rates made competition through leased facilities economically "wasteful." 359 F.3d at 573.

The court also ruled that the FCC had erred in failing to take account of the extent to which impairment was mitigated as a result of competitor's access to ILEC facilities available pursuant to State and federal service tariffs. This

was so even though the statutory question is whether comeptitors are impaired without access to these facilities at all. 47 U.S.C. § 251 (d)(3); App.C-1051a. Thus, on remand, the FCC was instructed to consider on its own the extent to which the price the ILECs offered wholesale services to competitors through State and federal tariffs make local competition possible without the need for federal "unbundling rules."

As indicated, until the decision under review, the FCC's authority to delegate to the States had not been subject to judicial challenge. And, while the lower court found the FCC's unbundling determinations insufficiently justified, it did not suggest that these determinations were incapable of adequate justification. Nevertheless, the court *vacated* rather than remanded the FCC's unbundling rules, *id.* at 595-95, inexplicably asserting that this harsh result was necessary given the FCC 's "apparent unwillingness to adhere to prior judicial rulings." *Id.* at 595. The industry has thus already been thrust into a state of extreme uncertainty, and, the competition States have worked so hard to create is already beginning to dry up.

Finally, the court upheld the FCC's decision eliminating competitor's access to line sharing. The court found that even if "there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment." 359 F.3d at 585. The only consideration the court pointed to, however, was that allocation of costs between the high frequency and low frequency portion of the loop would have "some inescapable degree of arbitrariness." *Id.* The court noted the record was ambiguous as to whether line sharing constrained the price of broadband service, *id.*, failing to consider the experience of the States that have seen line sharing bring immeasurable benefits. The result of the FCC's decision is that competitors will often be unable to provide voice service *or* broadband service.

REASONS FOR GRANTING THE WRIT

The court of appeals' sweeping holdings significantly undermines the plan Congress promulgated in the 1996 Act by (i) eliminating any meaningful role for the States in what was intended to be an exercise of cooperative federalism, and threatening the competitive environment State and federal regulators have worked so hard to create. The vigorous scrutiny the court provided to the FCC's national findings of impairment with respect to switching and transport contrast vividly with the minimal scrutiny the court provided the FCC's decision eliminating line sharing. The court's decisions were clearly animated by the view that the Act is intended to permit unbundling in only the narrowest of circumstances, a view directly at odds with the Act itself, which, as this Court has explained is intended to "'uproot' the incumbent LECs' monopoly and to introduce competition in its place." *Trinko*, 124 S. Ct. at 875 (quoting *Verizon*, 535 U.S. at 488). This Court should grant certiorari and reverse.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE D.C. CIRCUIT'S DECISION VACATING UNBUNDLING OF SWITCHING AND TRANSPORT.

A. The Lower Court's Decision Conflicts With Decisions of This Court and of Other Courts of Appeals and Threatens Other Cooperative Federalism Regimes.

1. To comply with the D.C. Circuit's mandate of granularity in *USTA I*, the FCC "delegated" to State commissions the task of identifying any "particular instances" where the FCC's national finding of impairment with respect to switching and transport was inapplicable based on precise principles articulated by the FCC. The D.C. Circuit struck down the FCC's "delegation" to State commissions even though, as this Court has explained, the

1996 Act's local competition provisions create "a hybrid jurisdictional scheme" of federal-State partnership. *Verizon*, 535 U.S. at 489; *see also AT&T*, 525 U.S. at 378 n.6, 384. The court held that "federal agency officials . . . may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so," even in the context of a regime of cooperative federalism such as that established in the 1996 Act. *USTA II*, 359 F.3d at 566. That holding squarely conflicts with decisions of this Court and of other courts of appeals and would impose a new limit on Congress's and federal agencies' ability to create cooperative arrangements with State regulators.

Applying normal principles of *Chevron* deference under which agencies have discretion to adopt statutory interpretations that are not unambiguously foreclosed by the statute, this Court has held that federal agencies can exercise their rulemaking authority to "subdelegate" the determination of a federal issue to a State tribunal when the statute is one, like the 1996 Act, that is jointly administered by federal and State officials and that expressly gives States a role in making the same or similar determinations. The Court thus recognized in *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473, 495 (2002), that when dealing with statutes involving "cooperative federalism," the Court has "not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." The authority for such subdelegations is to be inferred from Congress's grant of "related" issues to States. *Id.* at 495-97.

In *Batterton v. Francis*, 432 U.S. 416 (1977), for example, the Court upheld HEW's delegation to States of authority to determine certain eligibility criteria for federal benefits. Because States possessed independent statutory jurisdiction over aspects of the general subject matter, the Supreme Court held that Congress's direction that

unemployment be "determined in accordance with standards prescribed by the Secretary'" was sufficient to allow the Secretary "to recognize some local options" and to allow determinations of unemployment to be governed by State standards. *Id.* at 430 (quoting 42 U.S.C. § 607(a). The Court did not require that authority to "subsdelegate" be conferred by Congress in express terms. To the contrary, the Court held that it would "*not lightly infer a congressional intention to preclude*" federal agencies from delegating issues to States and "recognizing legitimate local policies" in jointly administered programs built on cooperative federalism. *Id.* at 431-32.[8] A grant of federal rulemaking jurisdiction was sufficient to create a presumption *in favor* of such delegations. *Id.*; *see also United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).[9] Yet the D.C. Circuit imposed the *opposite* inference in requiring explicit congressional authorization *for every particular subdelegation.*

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[8] *Batterton* involved a provision of the Social Security Act that made eligibility for federal benefits depend in part on whether an individual's father was in a state of "unemployment." *Batterton*, 432 U.S. at 419. Under a prior version of the statute, Congress had explicitly instructed that "unemployment" was to be understood "as defined by the State." *Id.* at 419 n.4. But Congress had stripped the statute of that authorization, and instead instructed that "unemployment" was to be defined by "standards prescribed by the Secretary." *Id.* at 418 n.2. Notwithstanding that Congress had explicitly stripped the statute of the subdelegation provision, the Secretary's regulation dictated that the definition of "unemployed father" come from the States. *Id.* at 417 n.1. The Court upheld the subdelegation, despite recognizing that "the congressional purpose [in the amendment] was to promote greater uniformity," *id.* at 431, because the Court did "not think that this shift of authority from the States to the Secretary required the Secretary to adopt a regulation that precludes any recognition of local policies." *Id.* at 430.

[9] Congress has relied on this presumption, specifically designating decisions that are to remain in federal authorities' hands. *E.g.*, 30 U.S.C. § 1273(c) ("Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands.").

The ruling below squarely conflicts with *Batterton* and *Blumer*. There is no question that the 1996 Act is "an exercise in cooperative federalism." *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd.*, 189 F.3d 1, 8 (1st Cir. 1999). The Act gives States express authority to arbitrate and approve interconnection agreements between incumbents and new entrants, and to approve general statements regarding interconnection that apply to all carriers within a State. Indeed, the 1996 Act requires States to "arbitrate" all "open issues" between incumbents and competitors, and in doing so, "to ensure that such resolution . . . meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251." 47 U.S.C. § 252(a)-(c), (e), (g); App.C-1046a –1049a, 1051a, 1054a.

By directing States to enforce the obligations of § 251 and any FCC regulations, *Congress* has expressly and directly delegated to States the authority to make unbundling decisions in arbitration proceedings whenever the FCC has been unable to make the determination itself or has made a policy choice that States should apply the general unbundling standard to the particular local conditions in each State.[10] *See also id.*; § 251(f) (authorizing States to suspend or modify statutory rural carrier exemptions from general unbundling obligations, and to exempt small ILECs from FCC-prescribed unbundling obligations) (App.C-1053a). Congress also left untouched the State's historical and primary responsibility to protect the public interest, convenience and necessity by applying local competition telecommunication laws, so long as they were not inconsistent with federal law. *See, e.g.*, 47 U.S.C. §§

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[10] As noted in the statement of the case, § 251 does not impose on the FCC an obligation to enact any regulations other than those "necessary" to "implement the requirements of this section." 47 U.S.C. § 251(d)(1); App.C-1041a. The statute thus makes clear that the FCC is free to leave decisions to the States when these decisions are not necessary.

251(d)(3) (preserving States' authority to enforce their own unbundling regulations) (App.C-1041a); 252(e)(3); (App.C-1051a) 253(b), (App.C-1055a); 261(b)-(c); (App.C-1057a); § 152 note (Pub. L. No. 104-104, § 601(c)).

As *Batterton* and *Blumer* make clear, this "independent jurisdiction over the subject matter," which Congress has expressly conferred on the States, gives the FCC the right to subdelegate to the States. But while acknowledging the States' "independent jurisdiction over the subject matter," *USTA II*, 359 F.3d at 565, the D.C. Circuit nonetheless stripped the States of that jurisdiction. This is inconsistent with *Batterton* and *Blumer*, and this Court should grant this petition to bring the lower court into compliance with this Court's ruling.

2. The court of appeals' decision also conflicts with the decisions of other courts of appeals, which have followed *Batterton*, and that split in the lower courts is an additional reason *certiorari* is warranted. For example, in *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990), the Ninth Circuit upheld the Health and Human Services Secretary's delegation to the States of the authority to determine the scope of the "good cause" requirement under the federal Work Incentive Program. As long as the State's interpretation of the statute is consistent with Congress', "such a delegation is not impermissible per se." *Id.* at 1377-78. Likewise, in *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), the Ninth Circuit held that "*[s]ubdelegation of administrative authority to a sovereign entity is not per se improper*" and that "*such a subdelegation*" need not "*rest on express statutory authority.*" *Id.* at 556. The D.C. Circuit's attempt to suggest that there was no delegation in that case notwithstanding, the Ninth Circuit there held that the regulation at issue required an Indian tribe's consent to a right of way grant and thus allowed another sovereign—an Indian tribe—to exempt particular locales from federal regulations. *See id.* at 552.

That is the same role that States have under the Triennial Review Order. The D.C. Circuit's holding on subdelegation thus not only contravenes this Court's own rulings, but adopts a presumption directly contrary to that adopted in the Ninth Circuit—creating a circuit split that will make it impossible for Congress to do its job.

3. Finally, the D.C. Circuit's ruling threatens State authority over other regulated areas, from energy to securities to the environment. Should the ruling stand, the powers of States and State agencies will be at risk whenever a federal agency has delegated the State some authority, whether or not the statute expressly authorizes the delegation. When the statute lacks an express authorization, the impact of the D.C. Circuit's rule is obvious. It threatens, for example, FERC's subdelegation to the States of the authority to set rates for certain purchases of energy, 18 C.F.R. § 292.304(b)(3), and to regulate certain operations, *id.* § 292.101(b)(1)(i)(A), decisions that fall within the powers Congress delegated to FERC, *see* 16 U.S.C. § 824a-3(a) (directing FERC, not State commissions, to issue regulations), not to the States, *see id.* § 824a-3(f) (authorizing States the power only to "implement" FERC's regulations). The ruling threatens SEC regulations that allow California law to define the breadth of certain exemptions to registration requirements, despite Congress's instruction that "the Commission" determine whether exemptions are in the public interest, *compare* 17 C.F.R. § 230.1001(a) (defining exemption by incorporating California law), *with* 15 U.S.C. § 77c(b) (directing SEC to determine whether exemptions are in the public interest).

The D.C. Circuit's ruling also threatens agency delegations even when a statute authorizes or dictates subdelegation, but does so in an ambiguous manner. For even when statutes direct a federal agency to place certain powers in States' hands, the statute is often unclear as to the full extent of that delegation. *Compare, e.g.*, 16 U.S.C. §

1535(a) (instructing cooperation with States "to the maximum extent practicable"), *with* 16 U.S.C. § 1535(c)(1)(B) (requiring determinations of endangered or threatened species status to be made "by the Secretary"), *and with* 16 U.S.C. § 1533(d) (permitting regulations regarding taking of certain species "only to the extent that regulations have also been adopted by such State"); *compare* 21 C.F.R. § 1250.26(e) (delegating certain licensing determinations to State authorities), *with* 42 U.S.C. § 241(a) (permitting Secretary to "encourage, cooperate with, and render assistance to" other public bodies).

Such schemes will be upheld in the Ninth Circuit, but are in doubt—or will be struck down—in the D.C. Circuit. *Certiorari* is warranted to resolve the ambiguity the decision below has created, which until corrected will lead to substantial unnecessary litigation concerning the propriety of many cooperative federalism enactments.

B. The Court Should Grant Certiorari Because the Court Below Has Incorrectly Decided an Important Question of Federal Law.

This petition raises important questions of federal law that this Court should resolve concerning the meaning and effectiveness of the 1996 Act. *See* Supreme Court Rule 10(c). The 1996 Act's local competition provisions "profoundly affect[] a crucial segment of the economy worth tens of billions of dollars," and "fundamentally restructure[] local telephone markets." *IUB*, 525 U.S. 366, 397 (1999) ("*IUB*"). The Supreme Court has twice granted certiorari to review court of appeals decisions striking down FCC regulations implementing the Act's local competition provisions. *See, e.g., Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *IUB*, *supra*. Here the lower court has struck down the FCC's unbundling rules, rules that are "[c]entral to the scheme of the Act." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 875 (2004); *see also IUB*, 525 U.S. at 371 (describing unbundling obligations as "foremost" among duties imposed by the 1996 Act).

The practical effect of the lower court's ruling is to eliminate the States from their designated role in bringing competition to local telecommunications markets. Moreover, by imposing extraordinary evidentiary burdens on the FCC before it can unbundle any network element, burdens more akin to constitutional adjudication then to administrative review, and then refusing to allow the FCC to share any of those burdens with willing State commissions, the court has reversed the basic premise of the Act – that it is to build on the unbundling regimes begun by State commissions in an "attempt[] 'to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises,'" and is, in that respect, "much more ambitious than the antitrust laws." *Trinko*, 124 S. Ct. at 883 (quoting *Verizon*, 535 U.S. at 476). The practical effect of the ruling is to disable the Act's central leasing provisions. And one consequence could well be the severe curtailment of competition in local telecommunications markets. Indeed, two of the primary

competitors that have succeeded in bringing competition to local markets have already announced their intention to pull back in wake of the D.C. Circuit decision. AT&T has announced its intention to stop offering local service to new residential customers in seven States, and, because consumers increasingly desire bundled local and long distance service offerings, to stop offering new long distance service as well. *TR Daily*, June 23, 2004. Z-Tel has similarly announced its intention to stop offering new residential service in eight States. *TR Daily*, June 22, 2004. These competitors likely acted in advance of issuance of new rules because they do not foresee any possibility of favorable rules on remand given the constraints imposed by the D.C. Circuit. These constraints are severe. As the *New York Times* contends, "[b]oth sides in the matter agree that if the Supreme Court does not alter the appeals decision, a central element of the landmark Telecommunications Act of 1996 will effectively be repealed." *See* Bush Backs Off Rule that Eased Phone Line Fees, *New York Times*, June 10, 2004 at A1.

To begin with, the court excluded States from the process. This was so even though Congress constructed the Act based on States' successful unbundling regimes prior to 1996, and understood that enlisting the States' expertise in this area would be critical to the success of the federal regime.[11]

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[11] *See, e.g., Trinko*, 124 S. Ct. at 881-82; *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (2000) (justifying FCC deference to States in § 271 decisions based in part on the "considerable expertise" of States in TELRIC proceedings and the "significant amount of background work" they perform); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 F.C.C.R. 22781, ¶ 78 (2001) (reasoning that "State commissions may be more familiar than the [FCC] with the characteristics of markets and incumbent carriers within their jurisdiction, and that entry strategies may be more sophisticated in recognizing regional differences"); *Local Competition Order* ¶ 53 (noting that inasmuch as "[v]irtually every decision in this Report and Order

Moreover, the D.C. Circuit's "granularity" rule requires findings based on detailed knowledge of local conditions before any unbundling determination can be made. Indeed, it was precisely because the court imposed this requirement that the FCC delegated to the States the role of identifying any locations in which unique circumstances might make unbundling unnecessary. The FCC on its own cannot possibly make the hundreds of thousands of discrete judgments that the court has now required before it will permit *any* unbundling to occur.[12] And the requirement that

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borrows from decisions reached at the State level," the FCC "therefore encourage[s] States to continue to pursue their own pro-competitive policies"); *In re Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Servs. in Texas*, 15 F.C.C.R. 18354, ¶ 2 (2000) ("The success of this application is due, in large part, to the extensive review conducted by both the Department of Justice and the Texas Commission."); *In re Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 F.C.C.R. 3953, ¶ 7 (1999) ("We applaud the dedicated efforts of the New York Commission, beginning shortly after passage of the 1996 Act, to work with Bell Atlantic and competitive LECs to ensure that Bell Atlantic would achieve compliance with section 271.").

[12] For example, although there was no evidence in the record that impairments based on hot cuts varied by markets, the court said that it could "imagine the Commission successfully identifying criteria based, for example, on an ILEC's track record for speed and volume in a market, integrated with some projection of the demand increase that would result from witholding of switches as UNEs" in order to identify markets where hot cuts did not cause impairment. 359 F.3d at 570. Such a task, even if possible, would be one of monumental proportions. Moreover, the FCC would have to identify not just variances in impairment based on hot cuts but also other variances. The FCC found that competitors often faced substantial cost disadvantages compared with the incumbents but found that whether these rendered CLEC use of their own switches uneconomic would vary from market to market depending on such factors as the density of customer lines in each individual wire center. For the FCC to determine precisely where such cost disparities cause impairment would alone require thousands of individual judgments.

it do so is inconsistent with the basic tenet of administrative law that agencies can adopt general rules based on conditions that exist in most instances. *See, e.g., Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 226-29 (1991). That is precisely what the FCC did here, concluding that unbundling of switching and transport were warranted in the vast majority of circumstances and that it was impossible to identify from the record where this was not the case. *TRO* ¶¶ 320-321, 387, 390-92, 473; App.B-391a, 471a, 477a, 570a.

Similarly, the D.C. Circuit required the FCC to address "narrowly-tailored alternatives" that might eventually resolve the hot cut issue that the FCC found to be one source of impairment. 359 F.3d at 570-71. But the alternatives to which the D.C. Circuit points are not ones ever adopted or even advocated by the ILECs, and the FCC found that the analogous processes some ILECs make available today are not efficient. *TRO* ¶ 474; App.B-571a. Nonetheless, the FCC directed States to consider such processes as possible ways in the future to obviate that portion of impairment caused by hot cuts, and States were in the process of doing so prior to the D.C. Circuit decision. *TRO* ¶¶ 521-24; App.B-630a. The FCC is not best suited on its own to determine whether these processes, which differ from ILEC to ILEC, will obviate impairment in particular markets with vastly different ordering volumes – much less to "imagine" other alternatives the D.C. Circuit will undoubtedly point to if the FCC again finds impairment. 359 F. 3d at 570.

The decision below also requires for the first time an assessment of local retail rates that immensely complicate the task that the FCC must now accomplish on its own. Specifically, the FCC must now consider claims that subsidies allegedly found in particular local retail rates make competition through leased facilities in a particular local rate zone "wasteful" or "synthetic." *USTA II*, 359 F.3d at 573. It must do so in hundreds of different retail zones across the

country for which it is by no means obvious whether subsidies exist at all. It must also consider whether such *competition might impose* too unfair a burden on the incumbents who on this hypothesis are at once forced to assess "high" subsidizing rates for some service, and then face what the court believed to be unfair competition from competitors who leased their facilities at cost-based rates. *Id.* This is so even though this Court recognized that the existence of implicit subsidies should not affect an unbundling analysis, *IUB*, 525 U.S. at 393, and even though the FCC explained at length why such subsidies were irrelevant. *TRO* ¶¶ 154-69; App.B-232a.

On top of those determinations, the FCC now must also consider whether any of the incumbents' State and federal *wholesale* tariffs providing access to services or network elements are an adequate substitute for unbundled network elements provided at the cost-based rates required by the Act. 359 F.3d at 576. But the Act focuses on a different question – whether competitors would be impaired if the incumbents did not provide access to an element at all, and, if the answer is yes, requires incumbents to provide access to the elements at cost-based rates. 47 U.S.C. § 251(d)(3); App.C-1041a. As the FCC has explained, this is so because otherwise, the ILECs would have "unilateral power to avoid" the cost-based pricing requirements "simply by voluntarily making elements available at some higher price." *TRO* ¶ 102; App.B-182a. The D.C. Circuit's ruling will also post vast administrative difficulties. The FCC will be forced to attempt to analyze the hundreds of tariffed services.

Of course the States themselves are in by far the best position to evaluate their retail and wholesale rate structures, if that is to be required. And the kind of complex rate cases the court evidently contemplates would be difficult enough for each State to conduct in advance of any unbundling determination. It plainly would be impossible for the FCC to make these calculations within any reasonable period of

time. Thus, the court's ruling will effectively eliminate the FCC's ability, in the face of contrary prior rulings, to create a detailed enough record sufficient to justify unbundling of certain key in *any market* on the terms required by the court.

That is not an acceptable result to State commissions, it is not an acceptable result under the Act, and it is a result this Court should review. States have expended extraordinary efforts to open their local telecommunications markets to competition. Indeed, under § 271 of the Act virtually every State has held extensive proceedings to evaluate whether its local market is sufficiently open to recommend to the FCC that the incumbent be permitted to offer long-distances services in the State. And at this point every State to consider the question has found that its local market is sufficiently open, *based on the competition made possible by the leasing of unbundled network elements.*[13] The FCC has

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[13] *See, e.g., In re the Commission's Own Motion, To Consider SBC's, f/k/a Ameritech Michigan, Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, No. U-12320, at 3 (Mich. Pub. Serv. Comm'n Jan. 13, 2003), *available at http://www.cis.state.mi.us/mpsc/orders/comm/2003/u12320m271report.pdf* (confirming the importance of unbundling for introducing and maintaining local competition); *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, No. 6720-TI-161, at 22 (Pub. Serv. Comm'n of Wis. March 22, 2002), *available at* http://psc.wi.gov/pdffiles/ord_notc/4534.PDF (ordering unbundling, under federal and State law of advanced services elements because it "serves the public interest and promotes competition by facilitating the provision of advanced services by CLECs who would otherwise be impaired without access to these facilities"); *In re Petition of MCImetro Access Transmission Servs., LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, No. 01-1319-TP-ARB, at 51 (Pub. Utilities Comm'n of Ohio Nov. 7, 2002), *available at* http://dis.puc.state.oh.us/CMPDFs/DNTZBEXOATKSDS21.pdf (concluding that "the continuation of the availability of Ameritech's Broadband Offering for the term of Ameritech/MCIm agreement will be in the public interest, since it will allow MCIm to compete effectively with Ameritech for advanced services").

then permitted this long-distance competition, based heavily on the recommendations of the States, just as the statute contemplates. The results have been promising, with multiple competitors competing in most markets in most States for both local and long-distance customers. But now the court has excluded the States, and left the FCC with an impossible task. This will undermine the competition Congress intended and State and federal regulators have jointly promoted.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE FAULTY ANALYSIS OF LINE-SHARING.

The court below upheld the FCC's line-sharing determinations. In performing its impairment analysis for line-sharing, the FCC makes a blanket national finding that "cable modem service is the most widely used means by which mass-market obtains broadband service." *TRO* ¶262; App.B-331a. This analysis ignores the state of competitive impairment in particular markets. Indeed, the findings are directly contradicted by the California Commission's finding that there is a lack of affordable, ubiquitously available broadband service options provided by alternative cable modem, satellite and wireless technologies in California. California Public Utilities Commission Decision D.03-01-077, *mimeo* at 14. The FCC noted that cable modem service is provided over nine million lines, which is approximately 57 % of all high-speed lines. *TRO* ¶262, n.777; App.B-331a. However, in California, according to FCC statistics, DSL remains the leading form of broadband access in California.[14] Further, one-third of all Californians live in cities where DSL is the only broadband service choice. *Id.*

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[14] *See, High-Speed Services for Internet Access: Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 7 (June 2003).

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FCC'S PRICING PROPOSAL FOR DELISTED ELEMENTS IS CONSISTANT WITH THE ACT.

Section 252(a)(1) (App.C-1046a) makes clear that interconnection agreements must specify the rates and the specific elements to be provided. While the Supreme Court found in *Iowa, supra*, that the Act is "not a model of clarity," two things *were* clear: (1) when interconnection agreements are negotiated, they are to be submitted to State commissions for approval, but if negotiations fail, "either party can petition the State commission . . . to arbitrate open issues." 525 U.S. at 373-374, and (2) with respect to rates established in such arbitrations "[i]t is the States that will . . . determine[] the concrete result in particular circumstances." *Id.* at 384. The rationale underlying certain determinations in the TRO upheld by the Court below are at odds with these pronouncements.

The FCC required the Bell Operating Companies ("BOCs") subject to §271 to continue to make available access to certain elements as a checklist item even if access to them is not "impaired" under §252. The FCC claims such access should be at "just and reasonable rates" under 47 U.S.C. §§201-202, *TRO* ¶662; App.B-763a, instead of using TELRIC pricing. Significantly, the FCC also suggests whether the BOCs have complied with those sections, including the pricing requirement, is to be determined *by the FCC* "in an enforcement proceeding brought pursuant to section 271(d)(6)." *TRO* ¶664; App.B-764a. Those determinations are inconsistent with the Congressionally-mandated State arbitration scheme and the plain language of the Act. Section 252(c)(2) (App.C-1049a) says State's "establish any rates for . . . elements." Congress intended

that provision, not §§201-202,[15] to govern pricing of elements. Nothing in the Act allows a BOC to establish rates for elements subject to the FCC's review in an interconnection agreement that goes to arbitration. *States* establish rates when the parties cannot agree, subject to review by the *federal district courts* pursuant to §252(e)(6) (App.C-1053a) or State courts, *not the FCC*. There simply is no basis in the statute for the FCC to write *State commissions* out of the rate-setting process and these *courts* out of the review process.

CONCLUSION

Based on the forgoing, Petitioners respectfully request grant of the writ of certiorari.

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[15] Nothing in §§ 201-202 provides the FCC with authority to either (1) set rates of elements in a disputed interconnection agreement or in freely negotiated agreements subject to State approval, or (2) require States to use a different standard in those arbitrations.